(10)

Office Supreme Court, U. S.
FILED
OCT 6 1926
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1925

NUMBER [redacted] 31

THE VILLAGE OF EUCLID and HARRY W. STEIN,
Inspector of Building,
Appellants,

vs.

THE AMBLER REALTY COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF ON BEHALF OF THE APPELLANTS.
(On Rehearing)

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In the Supreme Court of the United States

October Term, 1925
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The Village of Euclid and Harry W. Stein,
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Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

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BRIEF ON BEHALF OF THE APPELLANTS.
(On Rehearing)

At the prior hearing of this Cause in this Court, the Village of Euclid filed an Original and a Reply brief.

In this, the Supplemental brief now being filed by the Village upon the occasion of the present rehearing, counsel is desirous of inviting the attention of the Court to but three phases, the first of which is by far the most important and controlling. Indeed, it is believed that this is the first time this particular and important point has been prominently or topically presented to this Court in connection with the subject at issue, although referred to in both of our prior briefs.

PART FIRST

NO APPLICATION—No Refusal.

It is to be remembered that—as hereinafter more specifically pointed out—the pleadings show, the record evidences and in fact The Ambler Company concedes that it never made any application for any permit, never went before the Village Council to obtain any revision or amendment as is liberally provided for by the ordinance itself, never applied to the City Plan Commission for any revision, modification or alteration of the ordinance as it applies to the Ambler Company land, never applied to the Board of Appeals for any relief even though all of these procedures are and were specifically permitted by the ordinance and it never attempted to obtain any amendment or modification though that also is specifically authorized by the ordinance.

On the contrary, The Ambler Company—without any application for revision, amendment or modification of the ordinance and without desiring to build any kind of structure whatsoever—hastened into Court and applied for an injunction against the enforcement of each, every and *all* parts of the entire ordinance. The decree of the Trial Court struck down the *entire* ordinance and enjoined the Village from enforcing any part whatsoever.

I.

The Ambler Company has based its court action upon two grounds:

First—that the ordinance was *fundamentally* and basically in contravention of the Ohio as well as the Federal Constitution;

Second—that the ordinance was unreasonable in its application to the Ambler Company land.

BASIC Unconstitutionality ONLY question open to Complainant.

For the reasons hereinafter set forth, the Village contends that under the conceded circumstances and admitted conditions attendant upon the complainant's course, the Ambler Company neither then had nor has now the right to bring into issue any question other than that the ordinance is fundamentally and *per se* in violation of the Federal and State Constitution.

Though the Village concedes that under a proper set of facts and under proper circumstances the complainant may and would have the right to bring into issue the question of the reasonableness or unreasonableness of the ordinance as it applies to a certain parcel of land, yet because of the facts and conditions admitted by the Ambler Company, it does not have the right, in the present case and procedure, to bring into issue any question of reasonableness or unreasonableness of the ordinance as it applies to its land, even though the Village concedes that the Ambler Company may in the pending case have the right to bring into issue the question of the basic and *per se* unconstitutionality of the ordinance.

We pause to take one further step before the Village attempts to demonstrate that the Ambler Company should be limited to the fundamental question alone:—

It may not be so decisively determined as to warrant its being conceded and yet—because of the desire of the Village, manifested throughout its briefs and argument, to take advantage of no technical claim but on the contrary to concede all ground that it could possibly be expected to grant to the complainant—the Village makes no strong objection to the Ambler Company's contention that it had the right to go into a Court of Equity and to seek a restraining order against the enforcement of this ordinance

on the basic and fundamental ground and for the reason that the ordinance creates a so-called "cloud" upon its title and that the ordinance contains a penal clause which might possibly be visited upon the complainant.

This right to challenge the basic constitutionality probably accrues to the complainant even though it has made no application for a permit, has not attempted to obtain an amendment or modification of the ordinance and has made no appeal to the Board, for it is not strongly denied by the Village that the Ambler Company may have the right to assail the fundamental unconstitutionality of the ordinance without the complainant having taken any of these steps, because the complainant may contend that it is losing a part of the value or the possibility of sale of its property by virtue of the "cloud" created by the ordinance.

UNREASONABLENESS can Not be raised Now.

The Village having taken this step, it now invites the attention of the Court to its contention that under the facts and circumstances admitted by the record, the Ambler Company does not have the right to obtain an injunction on the ground that the ordinance is unreasonable in its application to the Ambler Company's particular parcel.

In order to make its position clear, this particular argument has been divided into parts A, B and C:

Complainant does not now want to build, or use land.

A. Though the record demonstrates (top six lines of page 104 of Record) the pleadings show and their briefs concede that the Ambler Company never made any application, never filed any plan and did none of the things which the ordinance itself permits by way of obtaining revisions, relief or amendments, the complainant neverthe-

less straightway went into Court and attempted to introduce the question of the unreasonableness of this ordinance as it applies to the complainant's land.

If the Trial Court or this present highest tribunal were to ask the Ambler Company if it is complaining because it can not build a factory on its Euclid Avenue frontage, the complainant would necessarily be compelled to concede that it had never in any way applied for any permission to build any factory upon its Euclid Avenue frontage, and that neither in the past has it, nor now does it *want* to build any factory.

So, too, if this Court were to inquire if the Ambler Company is complaining because it can not build railroad tracks or switches along its Euclid Avenue frontage, the complainant would be obliged to concede that it had never taken any steps to obtain any permission to build any switch or tracks along its Euclid Avenue frontage.

In the same way similar questions could be asked in reference to other kinds of construction (such as stores) upon the land in question and in each instance the Ambler Company would have to admit that it had never tried to obtain any permission (by applying for a permit, by making application or by means of amendment or modification or by appeal to the Board) to build *any* kind of construction upon the land in question.

That being true and the complainant never having applied for a permit to build any kind of structure whatsoever, how can a Court be asked to enjoin the enforcement of the ordinance on the ground that its terms are unreasonable in their application to the land in question, when the complainant has never asked for a permit of any kind?

The Village contends that until the complainant has asked for a permit and has been denied the same, the Ambler Company does not have the right to ask the aid of a Court of Equity in decreeing that the terms of the ordi-

nance are unreasonable in their application to the particular parcel of land.

Indeed, the complainant or its successor, may—when the time comes to build—desire to construct just what the ordinance permits, and now to allow an injunction against the enforcement of the entire ordinance upon the guess or mere possibility that the ordinance will *then* prove to be objectionable or unreasonable, is a position untenable and unwarranted in law and in equity.

As hereinabove stated, the Village does not vigorously contend that the Ambler Company is denied the right to pray for an injunction on the ground that the ordinance is *per se* violative of the Ohio and Federal Constitutions, but the Village does contend that until the complainant shall at least have applied for a permit to build some kind of structure and until such permit shall have been denied, the complainant does not have the right to obtain an injunction upon the ground that the ordinance is unreasonable in its effect upon the property in question.

Must not complainant try Remedies BEFORE Pleading Unreasonableness in Court?

B. Indeed, the Village is of the mind that the Ambler Company would be required to go further than merely applying for and being refused a permit before it could obtain the interposition of a Court of Equity on the ground that the ordinance is unreasonable in its terms affecting the land in question, for the Village believes that the complainant would be required to either seek amendment at the hands of the Council as provided for in the ordinance (Section 25, page 25 of Record) and as would at all events be available to any property owner, because—under the State Code upon this subject, Section 4366-11, as well as under the ordinance—the Council could always modify or amend any ordinance, or the complainant ought to be re-

quired to use one or more of the remedial and modifying provisions of the ordinance (Section 23, page 24 of Record and Section 25-D, page 25 of Record) before it obtains a Court's decree on the ground that the ordinance is unreasonable in its application to the parcel in question. (Kindly note last paragraph of page 15 and page 16 of Village Original brief.) But concededly, the complainant neither attempted to invoke any of the remedial provisions nor did it apply for a permit at all, nor does it *wish* to build any kind of structure.

Why Rush into Court when this is Available?

The complainant could very easily at any time, avail itself of Section 25-D of the ordinance (page 25 of the Record) because: (a) That remedy as well as other remedies under the ordinance are always open to everyone, and (b) because, particularly in reference to the property in question, the complainant could and can (under Section 25-D) set out an "area" for industrial use comprising almost its *entire* parcel without requiring any consents of any other property owners and that too, without being affected by any protests under Section 25-B. In this same connection, had a request been placed before the Board of Appeals, it is quite possible and the complainant can not be heard to predict against the fact that (as it has more than once done and as it is authorized under the ordinance) the Board of Appeals may well have recommended to the Council that there should have been some modification or revision of the ordinance as it applied to parts of complainant's land.

These provisions, in reference to revisions, modifications, appeals to the Board and amendments, are identical with many of the zoning ordinances which have been upheld by the Courts of final resort of the various states and are almost identical with the provisions of all of the several

hundred ordinances extant upon this subject. (A great many of these ordinances have been furnished by us to the court.)

Until at least one or some of these remedies are resorted to by the complainant the question of unreasonableness ought not be heard by any Court.

Two Simple Tests.

Indeed, as no application for any factory or industrial had then, or now has been refused, it may be fairly said that the ordinance is, in fact and in practice, not unreasonable, because no one has ever so much as wanted to build any industrial construction or asked to do so, contrary to the ordinance. (In this connection kindly note all of first paragraph on page 105 of the Record.)

Another method of evidencing the fallacy of the complainant's position may be readily found by applying the following test:

Let it be presumed for the moment that the Village would enter this Court and would consent to a decree permitting the complainant to establish stores anywhere at all upon its property.

Would that satisfy the Ambler Company?

The question answers itself in the negative, because the Ambler Company does not wish the mere right to have stores but it wants the "unrestrained and ungoverned" right to use its entire land and every portion of it for industrial and manufacturing purposes and for the attendant uses of tracks, switches and spurs. (Lower half of page 18 and lower half of 19 of Village Original brief.)

The Village contends that until the Ambler Company shall at least have applied for a permit for a factory and shall have been refused, it is not entitled to ask this or any other Court to restrain the enforcement of the entire ordinance, which is the very thing it is asking and the very re-

sult allowed by the Trial Court. In this connection 164 N. Y. 510, 249 U. S. 269 at Syl. 2 and upper portion of 273 and at 274, 248 U. S. at 500 and particularly 26 L. R. A. (N. S.) 842 are illuminating.

Indeed, it may fairly be said that the complainant is really afforded its "day in court" to obtain administrative or legislative relief by these sections and provisions of the ordinance, and that until these remedial processes are at least attempted by the complainant, it ought not be heard in its effort to strike down and nullify the entire ordinance, which is the prayer of the complainant and the decree of the Trial Court. In this connection we would respectfully refer to the following decisions which are not precisely and identically in point and yet are felt to sufficiently pertain to this phase of the subject so as to warrant their here being cited. 111 U. S. 701, *Hagar vs. Reclamation District* at the last two syllabi and 254 U. S. at page 69 as written by Mr. Justice Day. So, too, *Hodge vs. County,* 196 U. S. at Syl. 3 and at 281.

The Village Board of Appeals has held many meetings and has religiously applied itself to the task before it. In several instances it has recommended, under Section 25 (page 25 of the Record) to the Village Council that certain amendments and revisions would be advisable and in each instance such recommendation has been adopted by the Council. The Board of Appeals has had many meetings and has granted such appeals as relieved hardship without invading the safety or welfare of the community. (In connection with this function, kindly see pages 91 to 94 of our Original brief.)

In much the same way, as each Subdivider's plat comes before the Plan Commission, it is able to advise and regulate so as to create through streets, thoroughfares of sufficient width as well as new avenues. Indeed, a new thoroughfare will easily result and eventuate just north of

Euclid and parallel with it, under the ordinance as it now affects the parcel in question, and such a street will be tremendously valuable to the Ambler Company itself. (Kindly note pages 68 and 69 of the Village Original brief.)

This ordinance—as do all similar ordinances throughout the country—offers several speedy and readily-available avenues and remedies, upon all of which the complainant turned its back and straightway hastened into Court to strike down the entire ordinance. Under these circumstances complainant ought not—at this time—be heard on the question of unreasonableness.

The Court would Supplant the Village Officials.

C. If the complainant can obtain the interposition of a Court upon the ground that the ordinance is unreasonable in its effect upon the complainant's land, without the complainant filing any plans, making any application, being refused or resorting to any of the remedial provisions of the ordinance, then—in the judgment of the Village—the Court would really become the administrative officer of the affairs of the Village instead of the Village officials having that right and province; for if a complainant can obtain an injunction upon the ground that an ordinance is unreasonable without the complainant having submitted any plans, made any application or met with a refusal, then that means—in simple and plain language—that the officials of the Village can be overlooked, that they are shorn of their powers and duties and that a Court will substitute itself in performing the administrative duties of the Village in place of its officials carrying on that portion of its governmental affairs. As was said by Justice Harlan in 113 U. S., page 127:

> "And it would be extraordinary usurpation of the authority of a municipality if a Federal Tribunal should undertake to *supervise* such regulations. The

Fourteenth Amendment does *not* impair the Police Power of a municipality."

In this connection kindly see 197 U. S. 11, 198 U. S. at page 6, 242 U. S. at top of page 531.

Complaint of Unreasonableness Not Ripe.

The Village respectfully but firmly urges that the complainant—under the conceded facts and circumstances of this particular case—was without right to urge unconstitutionality upon the ground that the ordinance was unreasonable in its effect upon complainant's land; that the Trial Court was without right or power to hear or decree in reference to that question because of the conceded and admitted circumstances; and that this Court—before which this case comes *de novo* upon appeal—should not permit the complainant to be heard upon the ground that the ordinance is unreasonable in its effect upon the complainant's land, even though the Village does not firmly oppose the right of the complainant to be heard upon the fundamental and basic question of the ordinance being *per se* violative of the Federal and Ohio Constitutions, respectively.

Question Seasonably Raised by Village.

This question—though probably not necessary to have been asserted by any special pleading—nevertheless was seasonably raised by the Motion to Dismiss the Bill of Complaint, filed by the Village under date of July 20th, 1923, and appearing on page 27 of the Record, which Motion was overruled by the Trial Court. This was again seasonably pleaded in the Village Answer as shown at last two paragraphs of page 37 and lower half of 38 of Record. This was also urged in the Village Original brief, and please refer to (4) on page 26; (5) on page 34 and "Tenth" (1) on page 43 of our Reply brief which contains important statements in this connection.

This procedure would make the COURT the ORIGINAL Administrator of EVERY POLICE Regulation.

If this complainant is permitted to be heard at this time and under the admitted conditions, upon the question of unreasonableness of the terms of the ordinance, then every lot owner and every property owner will have the door of the Federal Courts opened through which every property owner may *immediately* enter and plead for an injunction, not only as to a zoning ordinance but also against every Building Code, against every Plumbing Code, against every Tenement House Code and indeed, against every similar state and municipal regulatory measure, and that door would be opened even though the complainant never applied for any permit whatsoever, never asked for permission to build any particular kind of structure, never filed any plans and never met with any refusal.

If the ruling of the Trial Court in this respect be held to be proper, then the Courts will have superseded municipal officers and each person conceiving himself aggrieved, will find the way open to immediately enter the Court Room without having even so much as applied to or having come before the respective municipal officials or board, whose duty and authority it is to administer the Building, the Tenement, the Plumbing, the Fire Zone Codes and the many other regulatory ordinances.

Unreasonableness is but mere MOOT Question Now.

The Village respectfully submits that under the record and the admissions existing in this case, the complainant should not be heard upon the question of reasonableness or unreasonableness of the terms of the ordinance in its effect upon the land in question; at least, until the complainant shall have applied and shall have been refused and

perhaps indeed, until the complainant shall have resorted to the available provisions for modification and amendment.

Indeed, this was the specific ruling in the Zoning case of *West vs. the City of Wichita, Kansas,* and in *Ware vs. the City of Wichita*—234 Pacific Reporter 978, decided April 1925—wherein the Court stated:

> "The zoning ordinance may be unreasonable when applied to a specific use which an owner desires to make of specific property, but until such a situation is presented there is no actual controversy between the owner of property and the city concerning the zoning ordinance. The owner is not entitled to litigate under this statute questions which may never affect him to his disadvantage. To speculate upon *possible* uses that the owner or his vendee might desire to make of the property, and seek a judgment determining them, is simply to ask the opinion of the Court with reference to a situation that may never arise." (From the copies of this ordinance which we have supplied to the Court, these remedial sections (21) will be found to be like those in the case at bar.)

So too, in the even more recent zoning case of *Dynzer vs. the City of Evanston*—decided December 1925—the Supreme Court of Illinois at pages 792-3 wrote as follows:

> "The twenty-seventh section permits changes and amendments in the boundaries of districts or the regulations established, and prescribes the proceedings to be taken to effect such changes or amendments. * * * We can not upon this record say that the ordinance is an unreasonable exercise of power, without rational relation to the public health, morals, safety, or general welfare. If Appellant feels that she has been aggrieved by the classifications of the zoning ordinance her *recourse* is to the Board of Appeals. The action of that body is reviewable by the Courts." (Copy of this ordinance is before court. Its amendment and its

remedial Sections—on its typewritten page 1 and on its printed page 13—are substantially the same as the Euclid Ordinance.)

In the notable case of *Wulfsohn vs. the City of Mt. Vernon,* 150 N. E. 120, the Court of last resort of the state of New York, in November 1925, at the bottom of page 124 and in syllabus 9 emphasized this same situation by saying:

> "Appellant complains that the regulations for setbacks are unreasonable because they do not graduate such setbacks to the size of the building but require the same area for a small as for a large building. Such an argument is not available to him. The only question which he is entitled to argue is that these setbacks are unreasonable in the case of a building four or five stories high and designed to accommodate nearly 600 people. It will be *time* to consider whether they should not be reduced in the case of a smaller building when somebody desiring to erect *such* smaller building complains of them as unreasonable." (A marginally indexed copy of this ordinance is before the Court.)

In 235 U. S. at the lower portion of page 26, Mr. Justice Holmes speaking for the Supreme Court in *Pullman Co. vs. Knott* wrote:

> "It is enough to say that a tax is not to be upset upon *hypothetical* * * * possibilities, if it would be good upon the facts as they are. *Keokee Consolidated Coke Co. vs. Taylor,* 234 U. S. 224."

To somewhat the same effect but not completely or wholly applicable to the present point, may we refer to the recent Opinion of Mr. Justice Stone, in the third syllabus of *Roberts Co. vs. Emerson, Secretary of State of Illinois,* decided April 12th, 1926, and *Hunter vs. Board of Levee District* at Syl. 6 and page 265 of 204 U. S.

Quite in point is the entire page 336 and the upper two lines of 337 of Chief Justice Waite's Opinion in the

prominent collection of "Railroad Commission Cases" found in 116 U. S., where the Court concluded by saying:

> "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it *any* effect whatever as against this company. * * * Many questions may arise under it unnecessary to be disposed of now, and we leave them for consideration *when presented.* * * * When the Commission has acted and proceedings are had to enforce what it has done, questions may then arise as to the validity of some of the various provisions, which will be worthy of consideration, but we are unable to say that, as a whole, the (Mississippi) statute is invalid."

And yet, in the case at bar, the complainant asked and the Trial Court granted a complete nullification of the entire ordinance, and that too, without the complainant ever having applied or ever having been refused any permit and without the complainant then or now desiring to build any kind of structure.

Further Comment.

In this connection the Village desires to add three further comments:

(1) As set forth on page 18 (Subdivision 12) and at Subdivision (3) of page 49 of the Village Reply brief, the Village has no fear of meeting the facts as established by the Record itself, for—as set forth on pages 15 to 26 and 34 to 42 of the Village Original brief and pages 4 to 8 and 47 of the Village Reply brief and part "Third" hereinafter —the Village feels that instead of the proof preponderating in favor of the complainant as is required of complainant, The Ambler Company really failed in its proof and, on the contrary, the Village established what was really unneces-

sary for it to establish, to-wit:—a clear disproof of complainant's charges and a preponderating proof to the *contrary.* (Part "Third" of this within brief and pages 28 to 32 of the Village Original and paragraphs 10 and 10 b on pages 15 and 16 and (8) on page 13 and page 12 of the Village Reply brief.);

(2) That the complainant has failed to comply with the requisite of establishing the fact that there not only is no relation but that there *could* not be any relation between the pubic safety and welfare on the one hand and this ordinance on the other hand; (pages 83, 89 (middle) and 62 of the Original and page 49 (3) of the Village Reply brief); and

(3) The Village herein prominently urges the point to the effect that the complainant ought not be heard on the question of unreasonableness because the complainant has never applied for any permit nor sought any remedy, but it does not urge this point in place of or in substitution for the point that the complainant has failed in its burden of proof and has failed to establish the lack of all possible relation to the public welfare. On the contrary, the Village urges this present point in this Supplemental brief in *addition* to what has been urged in the Village Original and Reply briefs to the effect that the complainant has failed to support its burden, to establish its charge and to prove the absence of any possible connection between the ordinance and the public welfare. (Please see pages 80 to 90 of our Original brief and page 49 of Village Reply brief. To *these* pages we respectfully again *urge* the attention of the Court, for therein are presented Cardinal Rules which importantly control actions of this character.)

PART SECOND

As to BASIC unconstitutionality.

And now, in reference to the complainant's contention that the ordinance is, *per se*, violative of the Ohio and of the Federal Constitutions, the Village submits the following for the attention of this Court:

(1) Though the Bill of Complaint did urge the unconstitutionality of the ordinance upon basic and fundamental grounds, it is a fact that in the oral argument of counsel for the Ambler Company, the following statement was made by the Ambler counsel at the previous hearing of this cause before the Supreme Court itself:

> Mr. Baker: "I want to say, in the first place, that I do not assume the burden of demonstrating the general and comprehensive invalidity of all zoning ordinances; and I have no special argument to make against an abstract philosophy on that subject."

It is believed to be fair to say that by this statement (which was not the only one of its kind employed during the Ambler counsel's presentation) the position of the Ambler Company was relegated principally, if not exclusively, to the question of unconstitutionality upon the ground of unreasonableness and since the Village is trustful that it has hereinabove demonstrated that the question of unreasonableness cannot and may not form the basis of a decree under the facts and circumstances admitted in this case, the complainant may not unfairly be said to stand before this Court without any strong or real ground of asking for court intervention.

Additional Favorable decisions SINCE both Village briefs.

(2) Indeed, in addition to the phalanx of states (including Ohio) as shown at pages 95 to 130 of the Original brief of the Village, which have held these Zoning Ordi-

nances legal and valid under the respective State and Federal Constitutions and in addition to the further decisions evidenced by pages 51 to 53 of the Village Reply brief, as having sustained these Zoning Ordinances, it has *since* been recorded by the State of Rhode Island; partially by the States of Maine and Florida and decisively by North Dakota's and Massachusetts' highest tribunals, that these Zoning Ordinances are looked upon as being constitutional and valid.

Since the filing of our Original and Reply briefs, in the case of *Stephens vs. the City of Providence* (133 Atl. Rep., 614), the Supreme Court of Rhode Island, speaking through its Chief Justice Sweetland, so recently as June 11th, 1926, held that:

> "Separation of business and industrial activities of the city, from its residential portions reasonably administered, may be supported in behalf of the public safety, public health, comfort and convenience"

and upheld the exclusion of an "Apartment House" from a "Single and Two Family Dwelling" district; further holding that the exclusion of business and industry from residences was even more clearly supportable.

The *Wulfsohn* case, referred to at page 98 of the Village Original brief is now reported in 150 N. E. R. 120, being the declaration made so recently as November 1925, by Chief Justice Hiscock and every associate of the New York Court of Appeals in favor of the validity of these ordinances.

Likewise, since the filing of our Original and Reply briefs, the Supreme Court of North Dakota, speaking so recently as March 1926, through Justice Burke—former Treasurer of the United States—announced that

> "Chapter 175 of the laws of 1923, granting the power to regulate and restrict the height, * * * the density of population, the location and use of buildings

is a legitimate exercise of the police power and is not in conflict with the Constitution of North Dakota, nor the Fourteenth Amendment to the Constitution of the United States." (208 N. W. Rep. 711.)

This decision, concurred in by every associate on that bench, upheld the exclusion of an "Apartment House" from "Two family and single residence" districts.

In May 1926, the Supreme Court of Massachusetts, for the fourth successive time upheld the validity of these ordinances, in the case of *Wood vs. City of Boston*, 152 N. E. R. 62.

With these additional decisions it may fairly be said that the leading states of the Union and indeed an aggregate of 16 states, have, through their highest tribunals, so firmly stamped their approval and validation, that the question of fundamental unconstitutionality has successfully been denied, literally, from coast to coast.

Indeed, the States of Ohio, Massachusetts, California, North Dakota, Illinois, Rhode Island, and the District of Columbia, as well as, partially, Maine and Florida have added new and emphatic confirmations since the ruling of our Trial Court and the States of New York, Kansas, Louisiana, Massachusetts, Minnesota and Wisconsin have reiterated their belief in the validity of these ordinances since the Trial Court in the case at bar ruled that these ordinances are fundamentally in contravention of the State and Federal Constitutions.

Because some of these decisions, referred to in our Reply brief, were then of such recent dates, we were unable to give this Court exact citations thereto. For this reason—without repeating any of the favorable State Court decisions set forth on pages 95 to 132 of our Original brief —we now offer specific citations to the since-rendered

favorable decisions referred to but not specifically cited at pages 51 to 53 of our Reply brief:

Illinois:

Deynzer vs. City of Evanston, 149 N. E. R. 784, 1925;
Burns vs. City of Aurora, 149 N. E. R. 790, 1925.

California:

Fourcade vs. City of San Francisco, 238 Pac. Rep. 934, 1925.

Louisiana:

State, ex rel. Gianygrosso vs. New Orleans, 106 So. R. 549, 1925.

Massachusetts:

Bradley vs. Board of Zoning Appeals of Boston, 150 N. E. R. 892, 1926.

These are in addition to those cited in this Supplemental brief.

Not a "Damage Suit."

In all of the many favorable decisions there have been admitted losses to the complaining parties, but these losses have not been permitted to defeat the exercise of the police power, for the Courts have recognized that cases involving the police power are not mere "damage suits." 233 U. S. at 669; 229 N. Y. 320.

On the other hand, the complainant as well as the Trial Court have so breathed into this case as to have literally tried to convert it into a mere "damage case."

This we have fully referred to at the lower half of page 43 and all of 44 of our Reply brief as well as at pages 51, 52 and the citations at pages 87 and 88 of our Original brief, to which pages we respectfully refer the Court at this time.

As to Churches and New Streets.

In the oral argument presented by the counsel for the Ambler Company at the original hearing of this cause, an effort was made to try to capitalize the provision which refers to churches. In the Village Reply brief at page 22, the theory of this provision was fully explained and it was frankly stated that the Village had never dreamed there could be any possible injury done under that provision but that—because of the recent discussion thereof in the Ambler oral argument—it was now frankly recognized that this might be possible, just as various parts of Federal and State legislations have been found to be better if revised or improved in certain respects. The Village Council while dealing with several other proposed revisions, has undertaken to amend this provision so that, by the time this case is reargued and decided by this Court, churches, schools and libraries will be permitted the highest classification and the freedom of every part of the municipality so that there may never be any possibility of anyone ever again raising this possible question. Indeed, the question was never raised by the Ambler Company until it reached its oral argument in this Court and apparently no one had theretofore or has since, raised it, because—as stated at page 26 of our Reply brief—every church has immediately been granted the right to go wherever it pleased in the Village. Beyond all this, the Reply brief pointed out that the Ambler Company admittedly did not want to build any church but wanted to have "the unregulated right" to injure the safety and the property of church going folks as well as others in the Village, so that it might derive "the greatest possible revenue from the wholly unregulated right to industrialize and railroadize all of Euclid Avenue itself."

PART THIRD

Unanswerable Facts:

In presenting this Third and final or reviewing phase, the Village submits that:

(1) The Trial Court specifically refrained from making any special finding of fact for, as stated by the Court on page 52 of the Record:

> "This case is obviously destined to go higher. On appeal in equity cases, the reviewing Court weighs the evidence and when taken in deposition form, it can do so as well as the trial court; hence it is unnecessary to make special findings of facts."

Beyond this important admission, this case comes here *de novo*, on appeal and this Court has had more opportunity to study the facts and the Record and the testimony than the Trial Court concededly had. (In this connection kindly note (3) on page 3 and (11b) on page 17 of our Reply brief.) Indeed, the parties were directed to argue the law and the facts to the Trial Court when much of the testimony had not been given and when most of that which had been given had not then been transcribed. Although all of the testimony was finally furnished to the court, the argument was *prior* thereto and counsel's brief was almost necessarily unattentive to the facts presented by the testimony, because the brief was necessarily being written during the nights of the very days when the testimony was being taken before the notary, and was required to be filed within one day after the testimony was completed.

(2) It is conceded that the Village of Euclid was incorporated many years before the complainant purchased the parcel in question.

(3) Because the Village felt that the preparation of the narrative form of testimony was in the nature of a

trust, counsel for the Village did not prepare this, but on the contrary, the Record in this case was prepared by a gentleman who is conceded to be the "Dean" of Court Reporters in this part of Ohio; a man who is a lawyer and is recognized as the author of writings that have attracted more than local attention. This gentleman did not record the case or the testimony at any time. At no time whatsoever did counsel for the Village of Euclid even confer with this gentleman. The typewritten testimony was handed to this man and without any interference whatsoever, he prepared the Narrative form of the Record.

No corrections were made by either side. The Record was printed just as prepared by this gentleman, Mr. Charles W. Chesnutt. Both sides have copies of the original, complete and full testimony. This reference is made here, because of pages 9 and 4 to 8 of our Reply brief.

(4) That the map appended to the Bill of Complaint and appearing on page 26 of the Record is not the map which obtained at the time of the trial, nor does it now obtain. Under the Amendment pleaded in the Village Answer (pages 36, 37 and 56 of the Record) and under the correct map (Defendant's Exhibit 2) the Industrials—after long and careful study by the Commission—(middle of 178 and lower portion of 206 of Record) are allowed just what the Industrials' own experts had informed the Planning Commission would be the ideal (about 1100 feet average throughout the Village and in most places the ordinance allows even more) industrial width and latitude (See last paragraph of page 206 of Record and 56 of our Original brief and 3rd paragraph of 154 of Record) from the railroad. As stated by Mr. Ambler himself in the 14th to the 11th last lines of page 141 of the Record:

> "There are no manufactories within that district I know of that come out 1200 feet from the Nickel Plate

track to the South (Euclid Avenue) throughout this entire tract in Euclid Village."

This revision of the so-called "Industrial" line from the original-tentative line, was made only after many months of additional study and conference with the railroad and industrial representatives and property owners, and only after their own experts (summoned from Chicago and other cities as well as locally) had testified before the Euclid Commission that the line of about 1100 feet was the usual and desirable latitude and area for such purposes. The Commission thereupon recommended and the Council adopted this.

In connection with this careful study please see 240 U. S. 513: "As the law was drafted by the Commission after years of observation and study * * * we might well hesitate to say there was no doubt upon the question."

(5) The complainant made no attempt to prove any usefulness of its land for store or similar commercial purposes; (Ambler's testimony at middle of page 137 of the Record and pages 25 and 26 of Village Original brief and page 199 of the Record as well at lower half of pages 12 and 16 of Village Reply brief and bottom of page 11 of Ambler's own brief.)

(6) That more store frontage along and adjacent to Euclid Avenue, as well as throughout the entire Village than can be used in fifty years, is freely allowed by the ordinance for store purposes. (Pages 38 and 39 of the Village Reply brief.)

(7) That the complainant conceded that store purposes would be almost completely limited to "strategic corners"; (page 38 of Village Reply brief and Ambler's own testimony at middle of page 137 of Record); and *all* of these "strategic corners" *are* admittedly open for stores, under the ordinance.

(8) That though provision is made for over 400 stores on and immediately next to Euclid Avenue at the "strategic corners" (as set forth on page 39 of our Reply brief) there is not a solitary store on either side of Euclid Avenue in the entire *seven miles* of both sides of Euclid Avenue frontage within the Village except the 26 (including barber shop, vacant stores and post office) which are now in the "center" and upon the "fringes of the center" of the Village. (See Village Large map—"Exhibit X" and lower half of page 38 and all of 25 and 26 of our Original brief.)

(9) That even in the two and one-half miles of Euclid Avenue frontage in the *Cleveland* territory—with street after street built up—which adjoins the Village, there are but two inconsequential, intermediate clusters of but 12 stores in total, until one reaches another small "center" of about 12 stores at the very westerly end of the Cleveland area which adjoins East Cleveland. (See Village Large Map—"Exhibit Z.")

(10) That the complainant has frankly sought the destruction of the ordinance in order to bring industry, factories, switches and spurs right up to the Euclid Avenue frontage because this was its conceded and admitted best way of obtaining the greatest value from its property; (bottom of page 93 and top lines of page 94 and page 89 of Record and *particularly,* quotations at lower half of page 18 of Village Original brief and just below middle of page 145 of Record and Ambler's own testimony at second last paragraph of page 137 and Witzel's testimony at lower portion of page 149 and third and fourth paragraphs of page 161 of Record).

(11) That this right to prevent such a use under the admitted facts and conditions of Euclid Avenue would be a nuisance and a probable danger which can be prevented by

common law without requiring the aid of any zoning ordinance, (page 18 [11-d] of Village Reply brief and citations there offered and lower half of 105 and top of 106 of Record and pages 21 [second paragraph] and 51 of Original brief).

In the present instance, some of these uses would be not only possibly but very probably and apparently injurious to the community and to the neighborhood. It would be no answer if the complainant were to say that some factories or industries might not prove dangerous or welfare-injuring or not subversive of the public health, because if the ordinance is stricken down as the Trial court has done, then the complainant is free to build *any* kind of plant and to run its switches and spurs up to Euclid Avenue as it undisguisably insists it has the right to do and wishes to do in order to get the greatest financial return from its land, regardless of the injury to the public safety, health and welfare.

And hence the Trial Court should not have enjoined the Village against preventing such a nuisance and menace and possible injury. Very illuminating on the subject of *possible* damage and dangers being permitted to be prevented by a municipality, is the case of *Pierce Corporation vs. City of Hope,* 248 U. S. 498, where Justice Holmes wrote, at page 500, in part, as follows:

> "Then as to the allegation that plaintiff's plant is safe and does not threaten the damages that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted, even on demurrer; as in the old case of a plea that the defendant threw stones at the plaintiff *molliter* and that they fell upon him *molliter,* 'for the judges say that one cannot throw stones *molliter.*' As was well observed by the Court below 'we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been

offered. The unexpected happens.' * * * If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp. Whether circumstances might make an exception from this principle need not be considered here."

(In this connection as to danger, please see pages 105, 106, 161 of Record.)

(12) That the Trial Court struck down the entire ordinance and destroyed it *in toto* (page 61 (8) of the Record) and that by its so doing, the Trial court opened the way for the complainant to bring switches, tracks, factories and every and any kind of construction and possibly-injurious use right up to the very sidewalk line of Euclid Avenue;

(13) And that if the decree of the Trial court were to be affirmed, the complainant who now faintly seeks to cloak its purpose under the guise of a claim to some day possibly use its frontage for store purposes, would be completely freed from all effects of the ordinance and would find its way to its admitted, conceded and unconceded desire to industrialize right up to Euclid Avenue with its switches, spurs and factories, even though that would be an apparent menace and an injury to all surrounding property, to greater Cleveland itself and to the entire Village and its inhabitants.

(14) The testimony of Mr. Kunkle may possibly leave the impression that the Village of Euclid is generously occupied by industrial plants, because Mr. Kunkle's testimony is, in part, so worded as to inter-blend and create no clear line of demarcation between the factories within and the factories without Euclid Village. (As for example all of page 69 which is likely to mis-impress as referring to

Euclid Village until one is set right by the seventh line of page 70 of the Record. So too, the middle portion of page 71.) For fear that the Court may be misguided by this "rapid-fire—salesman-like" testimony, the attention of the Court is invited to the following:

Actual facts as to stores and industries.

(a) There are but sixteen industrials within the entire Village of Euclid, when counting even the most inconsequential, such as a small coal yard. (Pages 99 and upper portion of 100 of the Record. Will the Court here kindly refer to page 36 of Village Original brief.)

(b) That there is not a solitary industry within the entire Village of Euclid that comes so close to Euclid Avenue as permitted by the Zoning Ordinance. (Ambler's own statement at 14th last to 11th lines of page 141 and last paragraph of page 103 of Record.)

(c) That running northwardly off Euclid Avenue to the Nickel Plate track, are numerous streets within the Village, and each and all of these streets are devoted to residence lots or are actually occupied by homes and residences (From middle of page 100 through 101, 102, 103, 104, 105 of the Record and also please see Village large map,—"Exhibit X.")

(d) That, indeed, this very same situation obtains in the Cleveland territory as well, outside of and next to Euclid Village, where there is a succession of streets, running from Euclid Avenue to the Nickel Plate track, occupied by homes and dedicated to residence purposes. (See Village large map "Exhibit Z.")

(e) That throughout the entire *thirty miles* of length from the Public Square of Cleveland, through Cleveland, East Cleveland, Euclid Village, Wickliffe, Willoughby, and

Painesville, comprising a frontage of sixty miles on the two sides of Euclid Avenue, there is not a single industry or factory or spur or switch which comes out to Euclid Avenue except two coal yards, and two supply yards, in that entire *sixty* miles of frontage, and these few "yards" were established years ago and cannot be used as a criterion by even a stretch of imagination. (Second paragraph of page 21 of Village Original brief and lower portion of 35 and 26 and "Tenth" (1) on page 43 of our Reply brief.)

(15) That in the enumeration of the industries and factories as given by Mr. Kunkle, he has covered a wide and large territory—much of it completely outside of and remote from the Village of Euclid and indeed everyone of these named factories—whether within or without the Village of Euclid—are located upon and next to the railroad track and do not come out to Euclid Avenue, and many of them are miles away from Euclid Avenue (such as Coit Road and Ivanhoe Road on page 69) and miles outside of the Village, (such as E. 105th Street on page 69, which is about 6 miles away) even though—in the manner used by Mr. Kunkle—one not knowing the territory might, at times, be led to believe that these factories are in the vicinity of Euclid Avenue or are close to Euclid Village. (Stein's testimony—pages 99-100 and last paragraph of 103 of the Record.)

(16) And in the same way, what the testimony of their witness Witzel may possibly suggest is similarly misleading because it refers to certain stone quarries as lying south of Euclid Avenue, whereas these quarries are miles south of Euclid Avenue, are not considered within the Village of Euclid and have no influence, either reflected or proximate, upon the Euclid Avenue situation, for people who pass Euclid Avenue day in and day out do not even know that these quarries exist because they are so small, so inactive and so far removed from Euclid Avenue.

(17) As uncontradictedly brought out by witness Stein, virtually the whole south side of Euclid Avenue was then—1923—and many more large parcels have since been allotted (in this connection the Village Large map—Exhibit X—is very important and informing) for or actually occupied for residence purposes—modest homes—or for charitable purposes and admittedly can not be used for any other purpose because of the steep incline and altitude of the South Side of Euclid Avenue, (last two paragraphs on pages 104 and middle of 125 of Record), and great portions of the territory lying north of Euclid Avenue between Euclid Avenue and the Nickel Plate track—is either actually occupied by homes or is allotted for and restricted by deed to residence purposes alone. (From third paragraph on page 100, all of 101, 102, 103 and Village Large Map—"Exhibit X.")

Some Guides from Ambler's own conduct.

(18) That, as conceded by Amblers, they themselves laid out their own land by running residence lots from within a few feet of Euclid Avenue almost to the Nickel Plate track, on both Dille Road and Cushman Road, and they themselves recognized that the utility for factories was along the railroad track because they reserved and sold the property along the railroad track as being the only part adaptable and appropriate for industrial purposes and upon this is located The Dille Road L..mber Company. (Top of page 147 of the Record.) And these residence lots are immediately next to the present parcel in controversy.

A better picture of this may be gotten from the Village large map —"Exhibit X".

(19) So too, the other Ambler parcel about a quarter of a mile east, presents another striking example of Ambler's own judgment in contradiction of what the com-

plainant is now contending for. Mr. Ambler testified at the bottom of page 136 that his father's other parcel of land does *not* come out to Euclid Avenue but that there are houses on and north of Euclid Avenue and then the industrial parcel begins and runs to the Nickel Plate track. This parcel is valued by Mr. Ambler himself at $8,000.00 per acre (last paragraph of page 136 of Record) whereas his willing witness—Kunkle—in the last paragraph of his testimony on page 73 places the valuation at $10,000.00 per acre, and both of these valuations were so placed in spite of the fact that the easterly parcel lies about 600 or 700 feet back or north of Euclid Avenue with houses and residences between it and Euclid Avenue. Finally, when being examined by counsel opposed to him, Mr. Ambler—recognizing the apparent inconsistency of his position—tried to cure his predicament by dragging in the statement that this unimpaired valuation was due to the fact that the easterly parcel had "frontage on the main road, Chardon Road," whereas: (a) Ambler and every witness did and had to agree that Euclid Avenue and not Chardon Road is the main thoroughfare, and (b) Chardon Road is but a secondary street or by-road (see Pltf's as well as Deft's maps) and (c) this parcel of Ambler's has a length from east to west, of 2000 feet (Ambler's own statement at lower part of page 140 of Record) and a very generous width, whereas its frontage on Chardon is over in one corner of this acreage and consists of only about 155 feet on Chardon, with no other easterly or westerly street or frontage outlet. This "limp"—we submit—was hardly enough to have undone the admission which Mr. Ambler as well as the facts themselves made plain.

Indeed, this easterly parcel not only has no Euclid frontage because houses occupy the space of 600 to 700 feet between it and Euclid Avenue, but the parcel does not have

even Railroad frontage nor more than a mere "neck" of street frontage, and yet Mr. Ambler was required to admit at page 141:

> "It is still worth $8,000.00 an acre, although it has the frontage of Euclid Avenue taken up for residence purposes to the extent of 650 or 700 feet, on account of its frontage on the main road, Chardon Road."

In addition thereto, that parcel is admitted to be of less value because it lies considerably east of the litigated parcel and is therefore less valuable than the parcel now before the Court. (See Ambler's own Statement to this effect, at middle of page 138 of Record.) And yet Mr. Ambler himself places practically the same value upon that easterly parcel, about which there is no complaint, as he placed upon the parcel in litigation, for he ascribed to the parcel in litigation the valuation of only $10,000.00 an acre (page 135 of Record) even if it is completely served by railroad switches and even though it is "unrestricted in every way." There can be but one lesson drawn from this additional example of the Ambler people's own conduct, namely: that the easterly parcel which—according to all witnesses—is concededly less valuable, is nevertheless given practically the same value by Ambler and by Kunkle as Ambler himself ascribed to the unrestricted industrialized parcel now before the Court, and that too, even though the easterly parcel has houses between Euclid Avenue and the easterly parcel to almost exactly the same degree as is provided for by the zoning ordinance itself. (Page 141 of Record.) It is furthermore to be remembered that Amblers purchased this easterly parcel after the houses in question, between the easterly parcel and Euclid Avenue, were constructed. (In this connection, kindly refer to page 24 and upper third of 25 of Village Original brief.)

What clearer guide or lamp of experience could be had than by this conduct and by this admitted testimony of Amblers themselves?

It may be interesting for the Court to note that their other witness—Witzel—just below the middle of page 150 of the Record, ascribed a valuation of $12,000.00 per acre to this easterly parcel, which is even greater than Ambler claims for the industrialized and "entirely unrestricted" use of the litigated parcel in question.

(20) And that—as set forth on page 46 (g) and (e) of the Village Reply brief—there are 1400 acres of available industrial territory within the Village of Euclid, most all of which lies open and welcoming industrial use. (See Ambler's own testimony at second paragraph of page 143 of Record; Village "Exhibit 2," large map—"Exhibit X," and particularly, pages 39 to 42 of Village Original brief.)

(21) And that there are a total of 14 *Miles* of Railroad frontage within the village, open for industrial use—enough for 2000 ground floor factories. (Page 42 and top of 43 of Village Original brief.) And yet the Bill of Complaint charged that this ordinance "seeks to erect a dam and hold back the flood of industrial development by destroying all the value of land in the village etc."

(22) That the "Labor Supply" and "Balanced Territory" is desirable and indeed necessary, is admitted by all of the witnesses including Ambler himself (just below the middle of page 143 and the last lines of page 146 of the Record and bottom of page 31, all of 32 and top of 33, 67 and 66 of Village Original brief).

(23) That the southerly side of Euclid Avenue must of necessity be used for residence lots, because of the topography and precipitous slope from the Euclid Avenue sidewalk southward. Though Mr. Ambler, in the lines just below the middle of Page 138 of the Record, has charac-

terized this land as usable for "A low class of residence, couldn't be the lowest, but it would be for the poor laboring class," yet these people and this land are entitled to the protection of health, safety and comfort, which would be necessarily and plainly invaded if the factories, industrials, switches and tracks come out to the opposite side of Euclid Avenue.

So too, witness Kunkle's statement, just below the middle of page 94 of the Record while being examined by Ambler's own counsel.

In this connection, it may be interesting to note that—as set forth in the Village Reply brief on pages 27, 28 and 29 at "g" on page 46—counsel for the Ambler Company attempted to picture this south side protection as being meant for "exclusive" purposes and to protect the homes of wealth on this south side, whereas Ambler himself has characterized this south side as usable for but "the poor laboring class." It really is neither in fact, for its use is and in the future will continue to be for average American homes and families—some quite extensive and others very modest.

(24) That even today—as set forth in (a) on page 45 of the Village Reply brief—no factory on the Ambler parcel has come even remotely near to Euclid Avenue, though this Ambler parcel—because of the Trial Court's injunction—has been open and completely unregulated for well on toward three years and though it always was open and unregulated except for the few months during which the ordinance was applicable to that parcel. Indeed, one more guiding lamp may be found in the experience of the Ambler Company by pointing out—as shown on the Village large map, "Exhibit X"—that the only industrial which has come upon this land has built its plant immediately next to and upon the railroad track itself. What clearer demon-

stration could be offered than by this actual and completely to be seen plant?

Very Indicative.

(25) That complainant's own witness—Kunkle—conceded that the logical use for the strip bordering on the northerly side of Euclid Avenue is for working people's homes, just as the ordinance itself provided. (Page 92 of Record)

The Trial Court has plainly stated that it has made no special finding of facts. Nevertheless the Trial Court declared that the normal use and development of Plaintiff's land along Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like mercantile establishments.

It may be true that the future and removed use may ultimately be for this purpose but it can not now be said —either from the Record or otherwise—that the present or immediate or even early use will be for such purposes. The statement of the Trial court is at variance with *every* witness who spoke upon this subject.

Euclid Avenue in Village is Not a business street Now.

We invite the attention of this Court to the statement of their witness—Mr. Kunkle—at the lower portion of page 92, to the effect that

> "the natural and logical way for development of that property immediately north of Euclid Avenue is by allotment for working men's homes."

In the same way Mr. Ambler himself testified at the middle of page 137 of the Record:

> "If unrestricted, so that this would be permitted, the value of that frontage of 200 feet deep would *not* be much in excess of that at the present time, on ac-

count of its being a little *beyond the present demand.* There would be a few strategic locations, as corners, and lots adjacent to considerable development, where there would be a demand for business, where that value would be greater than $20.00 to $25.00 a foot front."

As evidenced by pages 34 and 35 of the Village Original brief and pages 12 and 14 of our Reply brief, it is too apparent to require citation in order to show that Laronge and Greenlund and Stein and Whitten emphatically and logically testified that Euclid Avenue in the Village of Euclid is not a business street and that there is no demand for store use.

Greenlund said, at page 195:

"I am contending that this is allotment property today and ready and ripe for development. It is *not* ready and ripe for development as factory property, even in small parcels."

And at page 187:

"Euclid Avenue along there (in Euclid Village) is likely to work out as a commercial street *eventually,* but *not now.*"

So too, Laronge, at page 199 of Record:

"There is *no* demand for that frontage (Euclid Avenue) for retail business property even if it were unrestricted" * * *

"All of that property referred to could be disposed of *more* readily as residence sites, at the present time."

Witness Stein stated, at page 128:

"In my judgment the Ambler tract is worth *more* for homes than for factories, because there is no factory value, no factory demand."

Mr. Whitten—recognized authority—after careful survey and study, testified at page 119:

> "I would say that it *is* desirable to secure a strip of residential property north of Euclid and between Euclid and the industrial property. That would result in a *greater* value for industrial land in that section, because the chief drawback to the location of industry, especially along the south line of the Nickel Plate, is the poor labor supply, the fact that the labor has to be *hauled* to that section."

Once more Greenland said; at top of page 183:

> "It *would* be for the *best* interests of the entire population of Euclid to work out a plan for establishing a line 630 feet (north) of Euclid Avenue * * * in accordance with the ordinance. * * * If it grows in a haphazard way, without any thought of the future, you will find that Euclid Avenue will be more congested, the traffic situation will be almost *unbearable*. It will mean discomfort, danger, inconvenience, loss of time and almost everything that is not for the general welfare."

In the face of the fact that Ambler himself, Ambler's witness—Kunkle—and all five of the Village witnesses united in declaring that Euclid Avenue within the Village is not ripe for and is not a business street, the Trial Court impressed into the Record a diametrically opposite conclusion and impression.

With every respect for the Trial Court which is earnestly entertained by the Village and its counsel, it is earnestly urged that neither court decree nor judicial fiat can convert non-business property into commercial land, nor can an unsupported statement of a Trial Court be permitted to govern the Supreme Court itself, especially in a case which—in the words of the Trial Court—

> "is obviously destined to go higher, and on appeal in equity cases, a reviewing Court weighs the evidence, and *when taken* in *deposition form* it can do so *as well* as the Trial Court; hence it is unnecessary to make special findings of fact."

In this connection we would further invite attention to (4) on pages 38 and 39 of the Village Reply brief, which show the provision for several hundred stores on and at the "strategic corners" of Euclid Avenue.

Euclid Not an Industrial Street.

No witness said that the Euclid Avenue *frontage* is or soon will be fitting or ripe or "normally to be used" for factories or attendant switches and tracks. Yet the trial Court's decree will permit that very use.

Not a "Damage Suit."

(26) In leaving this "THIRD Part" of this Supplemental brief, the Village begs to remind the Court that this is not a "damage" suit. In this connection reference is made to "k" on page 46 as well as pages 47 and 48 of the Village Reply brief, to the effect that there is no proof on the part of the complainant of any loss except (a) that loss which might result from the complainant being disallowed to bring its nuisance-producing tracks, switches and factories out to the Euclid Avenue frontage; a use which may be prohibited without the employment of a zoning ordinance on the generally recognized principle of forbidding apparent and probable invasions of the public health, safety and welfare; or (b) a loss predicated upon the *assumption*—distinctly *contrary* to the facts—that the ordinance permits residence alone throughout the *whole* of the approximately 1800 feet from Euclid Avenue to the Nickel Plate Railroad, whereas, in fact and in truth, the ordinance permits all industries for the entire stretch from the railroad, southward toward Euclid Avenue, for an average distance of 1100 feet, or about 70% of all the unbuilt land between the Nickel Plate and Euclid Avenue, throughout the 4 mile length of the Village. This fallacious assump-

tion and wholly unwarranted basis for the alleged proof of loss, is, we trust, quite convincingly set forth on pages 4 to 8 and 10 to 12 of our Reply brief and 16 to 32 of the Village Original brief. We trust that the Court may find it fitting to again refer to these pages.

But even if there had been such proof as the complainant is required to have submitted, and even if it had not been founded on an assumption contrary to fact or on a permission subversive of public welfare, it is a generally recognized principle that loss which comes from a proper exercise of the police power is not such a "taking" as is forbidden by the Fourteenth Amendment. 250 Mass. 170; 150 Northeastern Reporter at syllabus 6: 207 U. S. 79 at page 87 and citations at pages 87 and 88 of Village Original brief.

What Complainant seeks.

The Ambler people are asking the Court to strike down the *entire* ordinance.

They are not asking that stores alone be allowed.

As to stores, they admit that there is no demand and they concede that there is only a possible future and prospective need. In this connection they themselves concede that only the "strategic corners" would be usable for store purposes, and it is to be remembered that none of their land is at any "strategic corner" and that all strategic corners *are* and have all along been available for store use, under the ordinance.

So that the question of stores is a question that need not be seriously considered at this moment. On the contrary, what they are asking is that the entire ordinance be stricken down so that when it is stricken down, they can use their land right up to Euclid Avenue for manufac-

turing and industrial purposes as well as for switches and spurs. (Pages 18 and 19 of Village Original brief.)

Indeed, if this sounds somewhat radical it is radical only because that is the very thing which the complainant is asking; if the Court is shocked by this statement, then the shocking is due to the complainant's request and attitude.

In fact, not only is it the request of the complainant that the entire ordinance should be stricken down so that they can use their land for spurs and tracks and factories right up to Euclid Avenue, but it is a fact that the Trial Court *did strike down* the *entire* ordinance (page 61 of Record) and that the Trial Court did thereby give to the complainant the very right to bring switches and spurs and factories and industrialism right up to Euclid Avenue itself. But the Trial Court never said Euclid Avenue is *industrial* nor does the Record permit of an assertion that Euclid Avenue in Euclid Village is an Industrial or a business street. No witness even intimated it was industrial, and yet, by the decree of the Trial court, the Ambler Company is free to satisfy its undisguised and asserted desire to bring switches and industry up to Euclid Aveune itself.

For this reason, we pause here to beg this Court not to permit itself to be deluded or ensnared by any pretense that the complainant is merely seeking the right to establish stores along the Euclid Avenue frontage, for it is conceded that there is no market or demand for stores (Ambler's testimony on page 137), but what the complainant seeks is to bring spurs and tracks and factories right up to Euclid Avenue; to have its land "wholly and entirely unregulated"; its testimony was completely given over to substantiation of this right; (Bill of Complaint; pages 18 and 19 of Village Original brief and page 135 of the Record) its values were almost completely limited to

the valuation under the right to have factories and industrialism come right out to Euclid Avenue (concluding part of second last paragraph on page 89, top lines of page 94, middle of 135 and pages 18, 19 of Original and 47 of Village Reply brief) and its *prayer* is to the effect that the *entire* ordinance should be nullified. (Page 12 of Record.)

This prayer was granted by the Trial Court. (Page 61 (8) of Record.)

The Village of Euclid says to this Court that any effort or pretense on the part of the complainant to picture this case as one intended to obtain for the complainant the right to establish stores, is a subtle mispicturing; this Court will not be deluded by any play upon the chords which are attuned to store purposes, because such an effort is as unfair to this Court as it is to the people of Euclid Village, for if this Court affirms the decree of the Trial Court, then this Court will be saying to the Village of Euclid that not merely stores but factories, switches, engines and tracks may come right out to the Euclid Avenue line —that it is "entirely and completely unregulated." Such a ruling and such a decree would cause the people of Euclid Village, of Greater Cleveland as well as throughout a good portion of northern Ohio to literally gasp, for it would be equivalent to giving that right along the outlying portion of Connecticut Avenue in Washington itself.

Not because there is an air of exclusiveness in the Village, not because there is any attempt to establish aestheticism, but because with or without a zoning ordinance, no tracks, no switches, no engines and no factories ought to be permitted along the main thoroughfare that leads through Cleveland, East Cleveland, Euclid Village, Painesville and miles beyond.

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Question of Unreasonableness NOT open to Ambler NOW.

This phase of the subject should not be confused with our other contention to the effect that since the complainant never applied for any permission to build any kind of a store or structure and since it never filed any plan nor took any appeal to the Board, nor sought any of the afforded remedial reliefs, it does not have the right to assail the entire ordinance *en bloc* and *in toto,* nor does it have the right to take a lantern in hand and to search for every possible real or imaginary defect when, as a matter of fact, the complainant has never asked for permission to build *any* kind of structure whatsoever and therefore any claimed defect or pretense under the aforesaid imagined conditions, are really not open to the complainant and are not rightly to be urged by the complainant under the present circumstances.

Likewise, though we may concede that the complainant does have a right of action *in presenti* through the avenue of an equitable proceeding, yet that right should not be confused with the pretended right to have the entire ordinance stricken down on the ground of unreasonableness, in the absence of complainant having applied for a permit, having taken any appeal, having sought any of the remedies afforded by the ordinance itself or having evidenced any intention of building any kind of structure at all.

Brief of Amici Curiae.

We wish here to advert to the brief filed by the National conference on City Planning, as *Amici Curiae.* With no intention of criticism and with a fitting respect for this brief, the Village nevertheless feels that in defense of its own position it does not wish this brief, like its predeces-

sor in the Trial Court below, to prejudice any of the rights of the Village, for (a) the Village earnestly finds itself unable to subscribe to several of the doctrines urged in this brief just as they were urged in the Trial Court, and (b) in addition thereto the Village—having studiously refrained from resting upon citations of so-called "nuisance" and "semi-nuisance" cases as supporting zoning ordinances—the Village can not conscientiously subscribe to the citation of such cases in the brief of the *Amici Curiae*. (Kindly note disclaimer at middle paragraph of page 76 of Village Original brief.) (c) Some of the other citations are not fully accurate, among these particularly being the North Dakota decision, which has long since been favorably ruled upon by the Supreme Court of that State and is no longer confined to the favorable opinion of its lower court.

Reports of New York Investigation Commissions.

We do respectfully ask that this Court refer to the Reports of 1913 and 1916 issued by the New York Investigating Commission and the Appendices thereto, copies of which—bound in red—we have placed before the Court. (References to the more prominent parts of these Reports will be found at pages 47, 48, 62, 63, 64, 67 and 68 of our Original brief.) We have also placed Ordinances of municipalities in about twenty-five states before this Court and have tried to include among these, the ordinances which have been held valid by the various State highest courts. Each of these many ordinances has been marginally referenced to the Euclid ordinance, in order that the Court may see that all of these ordinances are basically and in many provisions identically like the one at bar.

This Supplemental brief being in Addition to Village Original and Reply briefs.

The Village respectfully suggests that this Supplemental brief is not intended to displace the Original or the Reply briefs of the Village. It is earnestly requested that the Court may read the Original as well as the Reply briefs of the Village which were filed at the time of the prior hearing of this cause in this Court, so that the decisions and contentions of the Village as set forth in the two previous briefs filed by it, may be once more clearly in the mind of the Court.

Though this ordinance has been in effect since November 1922, it has never (excepting in one minor case which was promptly decided in favor of the Village) been assailed by any law suit but the present litigation.

Each year has seen a greater number of homes being built within the Village. As shown on page 55 of the Village Original brief and on page 105 of the Record, in the year 1923 (immediately following the enactment of the ordinance) the residential construction was approximately one and one-half million dollars for homes, while the factory construction for that year was but $50,000.00.

In 1924 there were 491 residences and similar buildings constructed, with a valuation of almost $1,300,000.00. In 1925 these buildings totalled to the number of 520, with a valuation of almost $1,750,000.00, and in the eight months of 1926, there were 330 buildings of this character with a valuation of almost $1,200,000.00.

The factory construction in 1925 was only $60,000 and for the eight months of 1926 was less than $35,000, even though it is conceded that fourteen miles in length with four railroad frontages, constituting 1400 acres of land lies open and awaiting industrial development. That acreage constitutes approximately one-fifth of the entire

village, which is the concededly ideal ratio between industrial and residential acreas. (Ambler's statement at middle of page 143 of Record and bottom of pages 31, 32 and top of 33, all of 66 and 67 of the Village Original brief.) During all this time not a single Industrial has even applied for a permit which has been refused.

CONCLUSION.

If communities are to be denied the right to do these things which, if left undone, threaten to undermine the very purpose for which municipalities are formed and for which civic government is created, then how are our American cities and villages to carry on and present a liveable and worthwhile environment and condition?

In the words of our own Ohio Supreme Court, in *Pritz vs. Messer,* in passing upon an almost identical zoning ordinance, this ordinance is not only a valid and proper safeguard of the public interests, safety, health and welfare at the present time, but in addition thereto "this problem must be viewed from the standpoint of coming generations as well."

The outlying and suburban portions of our country are emerging from their isolated and "Village-like" conditions and are rapidly approaching the station where even the suburban towns are concerned with traffic and living congestion that present new and original problems. With these revisions and new conditions come new problems. Mr. Justice McKenna speaking for the Supreme Court of United States in January of 1917 in the cause of *Merrick —Commissioner—against Halsey and Company* (242 U. S. at 586) described the position of the Court in reference to newly arising conditions, by saying:

> "It is to be borne in mind that the policy of the State and its expression in laws must vary with cir-

cumstances. And this capacity for growth and adaptation we state, from Mr. Justice Mathews, in *Hurtao vs. California,* 110 U. S. 516, 530 is the 'peculiar position and excellence of the common law.'

It may be that constitutional law must have a more fixed quality than common law, but, as was said by Mr. Justice Brewer in *Muller vs. Oregon,* 208 U. S. 412, 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does *not* mean that the form is so rigid as to make government *in*adequate to the *changing conditions of life,* preventing its exercise except by amendments of the organic law."

The legislatures of 31 States, by adopting State Enabling acts after investigation, have evidenced their respective judgments that zoning is constitutional. Almost every large city, from coast to coast, has indicated its opinion of validity, by adopting such ordinances. Municipalities—hundreds of them—located in 41 States of the Union have, through their respective councils and able legal departments, expressed their thought that the Constitution is not opposed to such measures and have enacted such zoning regulations. Congress itself has expressed its judgment that these regulations do not offend the Constitution, by adopting such a code for the District of Columbia.

This is not a radical or sectional or hasty movement. On the contrary, it is country-wide. It has come because American cities have seen not merely a desire but a very need and necessity for such regulatory provisions, in order to make present and future conditions livable,—in brief—in order to fulfill the very purpose for which municipalities were founded.

By reason of the testimony contained in the Record, for the reasons set forth in the Original, in the Reply

briefs and in this Supplemental brief, it is earnestly trusted that this Court may find it fitting and proper to reverse and set aside the decree of the Trial Court, to enter a decree for the Village, to hold that the question of unreasonableness is not now open to the complainant, to find that in keeping with the actual testimony in the Record there is in reality no unreasonableness and—in final—to answer the hopes and the trusts of the many states of the Union, of the hundreds of municipalities throughout the country as well as the almost thirty million people who are earnestly looking forward to a validation by this, the highest Court of the land, of the fundamental right to enact these zoning regulations for the protection of the safety, health and welfare of the people.

Respectfully submitted,

JAMES METZENBAUM,

Counsel for the Village of Euclid and Harry W. Stein, Inspector of Building.